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No. 99-1240

IN THE

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES and the ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT and MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC, THE BRAIN INJURY ASSOCIATION, THE JOSEPH P. KENNEDY, JR. FOUNDATION, THE NATIONAL COUNCIL FOR COMMUNITY BEHAVIORAL HEALTHCARE, THE AMERICAN PSYCHIATRIC NURSES ASSOCIATION and THE INTERNATIONAL ASSOCIATION FOR PSYCHOSOCIAL REHABILITATION SERVICES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici curiae are seven national disability organizations (more fully described in the Appendix) with an interest in protecting people with disabilities from invidious and irrational discrimination.[1]

SUMMARY OF ARGUMENT

When compared with other kinds of discrimination that have been addressed by Congress and by this Court, discrimination on the basis of disability presents relevant differences, as well as similarities. Respondent and other supporting *amici* have elaborated both the legislative history of the ADA and the larger societal history of mistreatment of people with disabilities. This brief offers a perspective on how these histories fit into the framework of this Court's Fourteenth Amendment jurisprudence.

The history of this Nation's treatment of people with disabilities has been described in this Court as "grotesque." Any fair reading of that history must acknowledge abuses by the States, often based on stereotypes and misunderstanding, and must conclude that these problems have been systemic rather than isolated. As with race and gender, despite considerable efforts over the last thirty or forty years, much of this mistreatment (and the attitudes that produced it) survive.

A centerpiece of this history is the failure of States to recognize the full citizenship of people with disabilities. Sometimes this exclusion was the product of fear and discomfort engendered by negative attitudes toward disabilities. Other instances arose from unexamined assump-

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[1] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

tions that people with disabilities cannot productively contribute to society or that including them would be more trouble than it is worth. But whatever the genesis of a particular discriminatory policy, it is this pattern of exclusion from the community—*exclusion from full citizenship*—that distinguishes it from discrimination on the basis of age, economic status, or other traits.

This Court has noted that some laws based on disability are rational and thus are not *presumptively* unconstitutional, as race and gender laws have been held to be. The Court made clear that this would free *legislators* from unwarranted supervision by the judiciary. State actions that address people with disabilities as a separate group contain both practices based on stereotypes that linger insidiously and recent efforts to address their problems from a more enlightened perspective. But as was true of race and particularly gender, some of the ameliorative efforts were themselves based on assumptions that failed to recognize the full citizenship of people with disabilities. One reason is the persistence of the attitudes themselves. Prejudice, once loosed is not easily cabined. And its durability is magnified by the continuing effects of past exclusion and segregation. States often continue discriminatory practices, both due to inertia and to the vested political interests of persons and groups who benefit from the status quo.

Congress recognized all of these facts when it enacted the ADA. Legislative factfinding was extensive and Congress also had the benefit of experience under earlier enactments involving disabilities. It reasonably concluded that a comprehensive civil rights statute was needed and that States, as a principal source of the problem, must be covered.

The question presented by this case is whether this carefully considered enactment was beyond Congress' power under Section 5 of the Fourteenth Amendment. Petitioner asks this Court, in effect, to limit the scope of that authority to

race and gender. Doing so would tell people with disabilities that they are ineligible for relief from State-sponsored and State-perpetuated discrimination in both the Federal courts and the Congress. And it would say to members of Congress that no matter how serious and persistent the problem they address, and no matter how carefully they act, they lack civil rights authority unless the class they seek to protect is essentially pre-approved by this Court.

The civil rights authority of Congress should not be employed casually or frivolously as an excuse to cater to politically powerful groups. But people with disabilities, having suffered a long history of mistreatment and exclusion by their States, and enduring the continuing legacy of that mistreatment, should be able to seek full citizenship by petitioning for relief from their national government.

ARGUMENT

I. DISCRIMINATION ON THE BASIS OF DISABILITY HAS UNIQUE ATTRIBUTES WHICH THE CONGRESS RECOGNIZED, AND WHICH SHOULD INFORM THIS COURT'S ANALYSIS OF CONGRESS' AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

Discrimination is not a uniform and unvarying phenomenon in American life. Denials of constitutional rights take different forms for each group that experiences discrimination. "[W]hile all prejudice has common roots and features, in combating such bias each group confronts a somewhat different legal template." *Amici Curiae* Brief of American Association on Mental Retardation *et al.*, *Romer v. Evans*, 94-1039, at 18. The unique characteristics of disability discrimination require special care from both the Congress and the courts.

A. The Development of Civil Rights Law, Both Judicial and Legislative, Has Varied For Different Groups.

The struggles against discrimination in American history have not followed a single path. Many groups of Americans have experienced invidious discrimination, and for each, there has been an evolution in this Court's understanding of the requirements imposed by the Equal Protection Clause. *Compare Hoyt v. Florida*, 368 U.S. 57 (1961), *with J.E.B. v. Alabama*, 511 U.S. 127 (1994). Some of this evolution is attributable to doctrinal changes in the Court's jurisprudence, but often it coincides with changing attitudes among the American people.

Constructing protections against invidious and irrational discrimination is not a simple task. How such changes are accomplished is a complex process, in which both the courts and legislative bodies have played crucial roles. The relationship between judicial recognition of the scope of constitutional protection, on the one hand, and legislative enactments to prevent discrimination, on the other, has varied. Sometimes, as with race, this Court's case law has substantively developed before the enactment of key anti-discrimination laws. For other groups, there has been important Congressional action prior to the full development of this Court's principal constitutional remedies. *Compare, e.g.*, the sequential relationship between *Brown v. Bd. of Education*, 347 U.S. 483 (1954) and the Civil Rights Act of 1964, 78 Stat. 241, *with* the relationship between the inclusion of gender discrimination in Title VII of the same statute *with Reed v. Reed*, 404 U.S. 71 (1971).[2]

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[2] *See generally* Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (1994); Kerber, *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (1998).

The principal lesson to be drawn from these diverging histories is that Congress and the courts are well advised to regard respectfully each other's findings regarding the necessity of protections against discrimination. Sometimes Congress, perhaps acting with insufficient care and circumspection, may have overestimated its authority to enact protections pursuant to its authority under the Fourteenth Amendment. *See generally Kimel v. Florida Board of Regents*, 120 S.Ct. 631, 649 (2000). At other times, with the hindsight of history, this Court may have assigned insufficient weight to concerns about constitutionally unacceptable discrimination against a particular group. *See generally Goesaert v. Cleary*, 335 U.S. 464 (1948); *Buck v. Bell*, 274 U.S. 200 (1928). The intersecting roles played by different branches of our government in addressing discrimination against disfavored groups is not a topic that admits of facile answers or hard and fast rules. Careful attention must be paid to the particulars of the unique discrimination encountered by each group and to the findings of the coordinate branch of government. Discrimination against people with disabilities presents the complexity of these issues in particularly sharp focus.

B. Disability, More Frequently than Race or Gender, May Be Relevant to Some Legitimate Governmental Purposes.

As this Court has recognized, mental retardation is not invariably irrelevant to constitutionally legitimate purposes. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). There is no reason to doubt that the same conclusion would be reached regarding other forms of mental and physical disability.[3] The issue in this case is what

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[3] *Amici* do not mean to minimize the importance of the distinction between race and gender, on the one hand, and disability, on the other. Disability is sometimes relevant to legitimate state actions, even some that affect fundamental rights. *Amici* do not suggest, nor did Congress, that

significance that observation has for the scope of *legislative* enactments.

Cleburne's addition of presumptive irrelevance to the factors that otherwise point toward semi-suspect status, *see generally. Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (plurality opinion), addresses concerns about the appropriate role of the judiciary in evaluating cases of disability discrimination. The *Cleburne* opinion initially observed that "where individuals in the group affected by a law have distinguishing characteristics relevant to" legitimate governmental interests, "*the courts* have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize *legislative choices* as to whether, how, and to what extent those interests should be pursued." 473 U.S. at 441-42 (emphasis supplied). Similarly, the Court noted that how the group of people with mental retardation "is to be treated under the law is a difficult and often a technical matter, *very much a task for legislators guided by qualified professionals* and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, *and we doubt that the predicate for such judicial oversight* is present where the classification deals with mental retardation." *Id.* at 442-43 (emphasis supplied).

Even more dramatically, *Cleburne* expressed concern that by recognizing semi-suspect status for judicial cases, the Court might inadvertently discourage legislators from

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States could never treat any people with disabilities differently than nondisabled people in any context. But state laws that discriminate on the basis of disability have often been the product of irrational and invidious prejudice. The continued existence and enforcement of those laws and practices is often the product of tenacious remnants of that prejudice, and of an almost unconscious acceptance that the exclusion of people with disabilities from central aspects of their communities' life is "just the way things are."

addressing the problem. "Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all." *Id.* at 444. From this observation, the Court concluded that "governmental bodies must have a certain amount of flexibility and *freedom from judicial oversight* in shaping and limiting *their remedial efforts*." *Id.* at 445 (emphasis supplied).

But *Cleburne's* freeing of legislators from unduly intrusive and possibly chilling judicial oversight did not change either the "grotesque" history of mistreatment of people with disabilities, nor did it eliminate the irrational and unconstitutional laws like the Cleburne ordinance. Such laws and practices endure, and in the ADA, Congress has sought to address this problem.

C. The Invidious and Irrational Discrimination that People with Disabilities Have Experienced Has Been Uniquely Virulent.

People with disabilities have confronted an extraordinary history of discrimination before the law. Although this history is not identical to that faced by racial minorities and women, neither is it of a different order of magnitude.

The history can be viewed many ways. One approach is to focus on particularly dramatic examples of disturbing mistreatment, such as a state supreme court's approval of excluding a child with cerebral palsy from public school because "his physical condition and ailment produces a depressing and nauseating effect upon the teachers and school children." *State ex rel. Beattie v. Board of Education*, 172 N.W. 153, 154 (Wis. 1919). These discriminatory attitudes and practices were not limited to a single region or group of states. *See, e.g.*, Noll, *Feeble-Minded in Our Midst: Institutions for the Mentally Retarded in the South, 1900-*

1940 (1995); Larson, *Sex, Race, and Science: Eugenics in the Deep South* (1995); Gallagher, *Breeding Better Vermonters: The Eugenics Project in the Green Mountain State* (1999).

Another approach to the history is to observe the numerous discriminatory provisions which have survived on the law books of the States, long past the time when more enlightened attitudes might have been expected to prevail.[4] One of the clearest examples of the durability of such discrimination is the fact that the exclusionary policies in the public schools exemplified in *Beattie*, *supra*, remained widespread in all 50 States until the enactment of the Education for All Handicapped Children Act by Congress in 1975, 89 Stat. 773, and the effects lingered far longer.

But perhaps the best means of gauging the breadth and virulence of the discrimination that has been visited upon citizens with disabilities is for this Court to recognize Congress' thorough documentation of the scope of the problem. Congress' awareness is evidenced not only by the legislative history of the ADA, but also from its experience

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[4] The reason for the durability of these discriminatory laws may be more complex than it appears at first glance. The natural tendency might be to explain them away as the consequence of mere legislative inattention, in the same way that some municipalities may still have ordinances on the books that prohibit the use of motor cars in any fashion that frightens horses. But the persistence of disability discrimination is not so benign. The fact that individuals with disabilities were locked away in distant institutions, that children with handicapping conditions were not allowed to attend public schools, that the state capitol building may have narrow doors and no ramp – these facts take on a life of their own. Even if society is no longer fully in the grip of eugenic fears, the legislative *products* of those fears continue to effect us. We come to accept *as the natural order of things* that schools are places reserved for mentally typical children, that people with disabilities are not encountered every day on the street, and that citizens seeking redress from their state government will be the kind of people who can make it through the capitol door.

with other statutes enacted in the preceding two decades to address aspects of disability discrimination.

D. The Discrimination Against People with Disabilities Is Not Merely Unfortunate or Disquieting, But Also Unconstitutional.

Under this Court's precedents, a discriminatory law can be found to be unconstitutional in several ways. One method would be a determination that the classification employed by the State is either suspect or semi-suspect. This Court declined to follow that route regarding people with mental retardation in *Cleburne*, and it gave no indication that it would view other disabilities differently.

The second method would be to subject the discriminatory laws to strict scrutiny when people with disabilities have been denied a fundamental right that is protected by the Constitution. States have frequently denied people with disabilities such rights. The most obvious are categorical or practical barriers to voting, deprivations of the rights of marriage, procreation, and parenthood. Just as clearly, laws subjecting innocent people with disabilities to institutionalization and residential segregation for eugenic or other purposes involve the fundamental right to physical liberty. *See United States v. Salerno*, 481 U.S. 739, 750 (1987); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). This Court has also made clear that there are substantive liberty interests retained even by individuals who have been lawfully institutionalized. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982).

Amici recognize that correctly identifying such laws as involving the deprivation of fundamental constitutional rights does not end the inquiry. In some instances the State may be found to have a compelling governmental interest which can be accomplished by no less drastic means. But this Court has repeatedly explained that laws depriving individuals of

fundamental constitutional rights are *presumptively* unconstitutional, *see, e.g., Harris v. McRae*, 448 U.S. 297, 312 (1980). Surely Congress could rely on that presumption, at least as a starting point, particularly where it provided States with an opportunity to rebut the presumption by demonstrating that the requested accommodation was unreasonable.

The third route to determining that a discriminatory law would be unconstitutional is to test its validity under this Court's decision in *Cleburne*. From the perspective of Congress, this would yield more ambiguous results. The Court made clear that laws involving mental retardation were not presumptively invalid, but that they violated the Equal Protection Clause if they were reflective of "mere negative attitudes or fear" or were motivated by "[p]rivate biases." 473 U.S. at 448. Congress clearly concluded that "the continuing existence of unfair and unnecessary discrimination and prejudice" against people with disabilities, 42 U.S.C. § 12101(9), often reflected archaic and stereotyped notions about the appropriate role in society for people with disabilities. *Cf. Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982).

Taken together, the statutes and practices that implicate fundamental liberty interests and those that reflect outmoded biases and prejudices against people with disabilities are sufficiently connected to rights protected by the Constitution. Congress reasonably and appropriately concluded that it could address these problems under Section 5 of the Fourteenth Amendment.

E. Disability Discrimination Is Unique Because of the Central Role Played by the States in its Implementation.

In *Cleburne*, five Justices of this Court described the history of discrimination experienced by citizens with mental

retardation as "grotesque." 473 U.S. at 454 (Stevens, J. and Burger, C.J., concurring); 473 U.S. at 461 (Marshall, Brennan, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).[5] The mistreatment, segregation, and discrimination acknowledged and deplored in those opinions did not primarily involve private action. What evoked the characterization "grotesque" was largely a history of abuse and mistreatment by governments, and, in particular, state governments. And to the extent that such ill-treatment and abuse rose to constitutional proportions, it is a history of unconstitutional *state* action.

Private individuals and organizations did not sterilize people with mental disabilities in pursuit of eugenic goals. Private schools were not primarily responsible for excluding students with disabilities from the American educational system. Nor did private organizations segregate people with mental disabilities into distant institutions and exclude and separate those citizens from their own communities. Prohibitions on marriage and barriers to voting and participation in the political process were erected and maintained by state governments alone.

Obviously, the States that produced this regime of discrimination were doing so at the behest of private advocates, who were fearful, mistrustful, and prejudiced about people with disabilities. Such private advocates often

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[5] *Compare* this Court's conclusion in *Kimel*, 120 S.Ct. at 645 (2000) ("Older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment.'") (citations omitted) *with Olmstead v. L.C.*, 119 S.Ct. 2176, 2191 (1999) (Kennedy, J., concurring in the judgment) ("persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility"). Justice Marshall chose a point of comparison from personal experience, and characterized the "regime of state mandated segregation and degradation" as rivaling "the worst excesses of Jim Crow." *Cleburne*, 473 U.S. at 462 (Marshall, J., concurring in the judgment in part and dissenting in part).

vehemently and passionately expressed their views about the need for governmental action. But governmental action is always the product of private advocacy; the laws that disadvantaged racial minorities and women were the product of similar advocacy by private citizens and organizations. As this Court has held, governments "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" *Cleburne*, 473 U.S. at 448 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).[6] Among the unique features of disability discrimination is, unfortunately, the central role the States have played as the principal source of the evil that Congress sought to redress.

The central role of the States in the history of discrimination against people with disabilities stands in sharp contrast to other kinds of discrimination. For example, discrimination by States against elderly citizens is primarily a phenomenon of the private sector, and where public discrimination exists, it simply reflects private sector practices. *Kimel*, 120 S.Ct. at 649. Unlike age discrimination, gender and racial discrimination historically have featured a more important role for governmental actors, taking such forms as official disenfranchisement and state enforcement of segregation, and before that, slavery. But even for race and gender (except for disenfranchisement prior to the Nineteenth Amendment and the Voting Rights Act of 1965), the role of government was largely to buttress and reinforce private discrimination. Religious discrimination in our legal history, both anti-Semitism and anti-Catholicism, was also primarily the codification of intense private bias. By

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[6] Neither, of course, may the state "become the instrument for generating the prejudice and hostility" that disadvantaged groups encounter. *Rice v. Cayetano*, 120 S.Ct. 1044, 1057 (2000).

contrast, State mistreatment of people with disabilities has differed qualitatively from the kind of discrimination that nondisabled citizens committed in their private lives.

But just as the discrimination faced by people with disabilities is unusual in the central role played by State governments, it is even more distinctive because of the form that state action has taken. State mistreatment of people with disabilities has featured pervasive and systematic effort to exclude them from full citizenship in their own communities. Citizens consigned to lifelong confinement in distant residential institutions were not placed there because the State assumed that they would prefer the comforts of segregation to living in their own communities. *Cf. O'Connor v. Donaldson*, 422 U.S. at 575. The child in *Beattie*, *supra*, and untold thousands like her were not excluded from public school because of a belief that they would achieve citizenship more effectively without schooling. *Cf. Brown*, 347 U.S. at 493 ("[E]ducation . . . is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship."). The individuals who were denied the right to marry or the opportunity to have children were not deprived of those liberties because the government thought they would lead happier lives without families.[7]

In each of these instances, the judgment was made *by the State* that society would be benefited if the people with

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[7] The eugenic motivation behind laws requiring sterilization is obvious. It may be less apparent, however, that similar motivation led to the barriers to marriage and consignment to residential institutions. *See, e.g., State v. Wyman*, 173 A. 155, 156 (Conn. 1934) (describing purpose of both statutory rape and marriage laws); *Lau v. Lau*, 122 A. 345, 346 (N.H. 1923) (purpose of marriage prohibition); Ala. Code 1975, § 22-52-51 (1997 repl.) ("Should the institution at any time not be able to accommodate all who should be admitted thereto under this section, preference in admission shall be given to children *and women of childbearing age*.") (emphasis supplied).

disabilities were removed from central aspects of ordinary civic life that are available to all other citizens.[8] States may have had a compelling justification for some instances of exclusion, but that is not the point. Crucially, each individual manifestation of state discrimination formed part of a larger pattern—the failure or refusal to recognize that citizens with disabilities were citizens first and people with disabilities second.

There is a further unique complexity regarding state discrimination against people with disabilities as it relates to private discrimination. Through residential segregation and school exclusion, as well as other means, the States *exacerbated* private discrimination. This was not merely a matter of ratifying or giving state imprimatur to private bias. Rather, the States, however inadvertently, promoted private discrimination by preventing ordinary day-to-day contact between nondisabled citizens and those who had disabilities. It is now widely understood that actual contact and interaction between individuals help to erode the barriers of prejudice. The States, by separating individuals with disabilities, fostered the survival of private prejudice by keeping people with disabilities apart, and mysterious, and *frightening*. Usually, the States are not responsible for giving

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[8] It is also true, of course, that the motivations of States have been neither completely monolithic nor unchanging over time. In some of the earliest (and most egregious) discriminatory laws, the motivation to protect society from people with disabilities may have been accompanied by at least the rationalization, and perhaps the belief, that the individuals would also benefit from their exclusion. In more recent times, the continuation of these practices may also have been partially grounded in altruistic motives. But Congress found that many of these rules were "overprotective," 42 U.S.C. § 12101(5), and the product of "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society". 42 U.S.C. § 12101(7). *Cf. United States v. Virginia*, 518 U.S. 515, 532 (1996) ("equal opportunity to aspire, achieve, participate in and contribute to society based on their *individual* talents and capacities") (emphasis supplied).

individuals who have disabilities, their handicapping condition,[9] and thus the disability itself is not a product of state action. But the States impeded the acceptance of those citizens in the private sector by preventing the interaction that otherwise would have begun to dispel "archaic and stereotypic notions" and "simplistic, outdated assumptions" about the appropriate role of people with disabilities in our (and *their*) society. *See Mississippi University for Women v. Hogan*, 458 U.S. at 725-26.

As a result of all these considerations, discrimination against citizens with disabilities is surely an appropriate subject for Federal civil rights legislation.

II. CONGRESS ADDRESSED THIS CONSTITUTIONAL PROBLEM WITH EXTRAORDINARY CARE; AS A RESULT, THE ADA IS CONGRUENT WITH THE GUARANTEES OF THE FOURTEENTH AMENDMENT.

The fact that Congress investigated the problem exhaustively, and correctly concluded that people with disabilities were often the victims of unacceptable discriminatory treatment, does not end the inquiry. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). This Court found that evaluation to be relatively straightforward in *Boerne* and *Kimel*. The analysis of the ADA is substantially more complex.

In order to determine whether Congress acted congruently with the constitutional problem it confronted, it is necessary to begin with the nature of constitutional violations by the

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[9] *But see Youngberg v. Romeo*, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring) (state responsibility for the loss of skills resulting from the effects of institutionalization).

states against people with disabilities. *Amici* have already discussed the Equal Protection Clause. But unlike other forms of discrimination, State laws disadvantaging people with disabilities have implicated *all four* of the protections in Section 1 of the Fourteenth Amendment.[10]

A. States Have Consistently Deprived People with Disabilities of Liberty Interests Protected By the Due Process Clause.

Congress was fully aware that there was a persistent pattern of States depriving people with disabilities of fundamental liberty interests without adequate justification.

The most obvious category of liberty deprivation has been the States' institutionalization of people with disabilities, which Congress explicitly addressed in its findings in the statute. *See* 42 U.S.C. § 12101(2) and (3). As this Court has observed, freedom from physical confinement is at the heart of the liberties protected by the Due Process Clause. Confinement in a residential institution, whatever its purpose, has long been recognized as a "massive curtailment of liberty," *Humphrey v. Cady*, 405 U.S. 504, 509 (1970), "which severely diminishes the everyday life activities of individuals." *Olmstead v. L.C.*, 119 S.Ct. 2176, 2187 (1999). There is nothing in the nature of having a disability which makes that liberty less precious, nor its curtailment any less momentous.

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[10] Although this brief focuses on the Equal Protection, Due Process, and Citizenship Clauses, it is also true that the same State practices have interfered with the Privileges and Immunities of citizens with disabilities. While this clause has received a relatively narrow reading, it has been held to include the rights to travel between States, to enter Federal lands, and to participate in the Nation's political processes. It is indisputable that an individual who is locked up in a segregating institution because of a disability is deprived of those rights (among others) by his State, and Congress has the authority to redress those deprivations.

This "strong interest" in physical freedom, *see Foucha v. Louisiana*, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring in part and concurring in the judgment), is compounded because such confinement of people with disabilities often carries with it further deprivations and intrusions into liberty interests. *Vitek v. Jones*, 445 U.S. 480, 492 (1980). But even the fact of confinement itself entails far-reaching consequences for the individual, including "loss of liberty to choose his own friends and companions, select daily activities, decide what to eat, and retain a level of personal privacy, among other things." *Heller v. Doe*, 509 U.S. 312, 341 (1993) (Souter, J., dissenting). Subjection to a sustained regimen of institutionalization, over time, often results in the atrophy and loss of the individual's *ability* to make such decisions regarding his or her own life. *Cf. Youngberg v. Romeo*, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring).

The legacy of widespread State deprivations of the liberty interests of individuals with disabilities implicates Congressional authority under the Fourteenth Amendment in two distinct ways. The most obvious is that Congress sought to prevent such deprivations in the form of unnecessary confinement. *Olmstead*, 119 S.Ct. at 2185. Of equal importance, Congress had a restorative interest in assuring that people with disabilities received appropriate ameliorative assistance in overcoming the continuing effects of past liberty deprivations.

B. State Laws Have Had Both the Purpose and Effect of Depriving People with Disabilities of the Very Fact of Citizenship Itself.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This sentence is a central command of the Fourteenth Amendment.

The Citizenship Clause was included in the Amendment to ensure that States could not erect a caste system which disadvantaged those recently freed from slavery. *See Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Thus, its central purpose was not to protect travelers or ensure freedom of movement among the States. Rather, its purpose was to prohibit exclusion of citizens from the political community *by their own States*. *See generally*, Kettner, *The Development of American Citizenship, 1608-1870*, 341-51 (1978). And as the Court has recently observed, a State cannot "deem a class of persons a stranger to its laws." *Romer v. Evans*, 517 U.S. 620, 635 (1996).

One State law creating an institution of residential segregation defined its purpose as addressing "feeblemindedness, including idiocy, imbecility, and the higher grades and varieties of mental inferiority *which render the subjects unfit for citizenship*." Act of April 3, 1920, ch. 210, § 17, 1920 Miss. Laws 288, 294 (emphasis supplied). While this statute was unusual in the candor of its language, it accurately captured the spirit of laws that have discriminated against people with disabilities.

No other group of American citizens has faced systematic and total exclusion from our public schools. *Cf. Plyler v. Doe*, 457 U.S. 202 (1982). Seldom have groups of American citizens been deprived of their physical liberty for sustained periods of time solely because of accidents of birth. *Cf. Korematsu v. United States*, 323 U.S. 214 (1944). No other group of citizens has suffered under State laws that deprived them of the right to marry and have children without any predicate in the behavior of the individual. *Cf. Skinner v. Oklahoma*, 316 U.S. 535 (1942). Few other groups of citizens have been categorically excluded from jury service. *Cf. Strauder v. West Virginia*, 100 U.S. 303 (1880); *Ballard v. United States*, 329 U.S. 187 (1946). And when major groups of American citizens have been denied the right to vote, we

have found that fact so dissonant to our constitutional faith that we deemed it an appropriate occasion to amend the Constitution itself. *Cf.* U.S. Constitution, Amendments 15 and 19.

All of these rights are commonly understood to be badges and incidents of citizenship. Their cumulative denial is unique, at least in the twentieth century. Litigants disadvantaged by a particular statute frequently claim, sometimes hyperbolically, that it treats them as "second-class citizens." *Cf. Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 922 (1986) (O'Connor, J., dissenting). But it would be inaccurate to claim that discriminatory state laws treated people with disabilities as second-class citizens when it is difficult to discern what attributes of citizenship their States left them. The totality of the legal structure under which people with disabilities have lived has clearly sent them the message that they are outsiders, set apart, and are not, in any sense, full members of the political community. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

As this Court has memorably observed, "Citizens of the United States ... have the right to choose to be citizens 'of the state wherein they reside.' U.S. Const., Amdt. 14, § 1. *The States, however, do not have any right to select their citizens.*" *Saenz v. Roe*, 119 S.Ct. 1518, 1530 (1999) (emphasis supplied). Thus, no State can deny citizenship to a migrant from another state based on financial status. But just as clearly, a State cannot pick and choose among its residents, on the basis of physical or mental disability, those who will receive full recognition of American and State citizenship, and those who will not.

Congress was empowered, under Section 5, to guarantee the citizenship of people with disabilities.

III. THE CARE CONGRESS TOOK IN CRAFTING THE ADA PRODUCED LEGISLATION THAT IS PROPORTIONAL TO THE INTRACTABLE CONSTITUTIONAL PROBLEM POSED BY DISABILITY DISCRIMINATION.

The requirement that legislation enacted pursuant to Section 5 be "proportional" assures that Congress, even when it addresses a topic related to rights protected by the Fourteenth Amendment, does not overreach its authority. But there is nothing in the text or the history of Section 5 that invariably limits Congressional authority to minor legislative remedies. "Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Kimel*, 120 S.Ct. at 648. Although the ADA is a relatively comprehensive civil rights statute, it is not disproportionate to the constitutional problems that required its enactment.

Congressional action under Section 5 must be remedial rather than substantive, which is to say that such legislation must enforce constitutional rights rather than create new ones. But "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." *Boerne*, 521 U.S. at 518.

In enacting the ADA, Congress concluded that it was necessary to remove both public and private barriers that stood between people with disabilities and full citizenship. The fact that those barriers were both multiple and varied only clarified the necessity of enacting relatively comprehensive legislation. For example, viewed in isolation, it might or might not be held to violate the Constitution to hold elections in locations inaccessible to people with physical disabilities. But Congress could surely have concluded that requiring States, wherever possible, to

eliminate such barriers would enhance the ability of those citizens to secure "nondiscriminatory treatment by government" in the "provision or administration of governmental services." *See Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966); *Boerne*, 521 U.S. at 528. This is especially true when Congress found such discrimination to be particularly pervasive. *Cf. Morgan*, 384 U.S. at 653.

The proportionality of Congress' response to the constitutional problem it confronted is made even clearer by the scope of the remedies and defenses it provided. The structure of the ADA in some ways resembles that of the Civil Rights Act of 1964; yet in provision after provision, Congress carefully tailored the statute's reach to the particular contours of the unique constitutional problems presented by disability discrimination. The provisions requiring only "reasonable accommodations" and exemption of adaptations which "would impose an undue hardship" on covered entities evidence Congress' concern to avoid overreaching.

Congress clearly sought to strike a balance between two important goals. The first was removing the State-created and State-maintained barriers to full community participation by people with disabilities. The second goal, equally apparent on the face of the statute, was limiting the level of adaptation and expense that States would be required to undertake in pursuit of the first objective. *See generally Olmstead*, 119 S.Ct. at 2188-90. The congressional reconciliation of these two goals recognized that while there are "real and undeniable differences" between citizens with disabilities and nondisabled individuals, *see Cleburne*, 473 U.S. at 444, these factual differences do not justify many forms of State discrimination. Much of that discrimination was the product of archaic views about the proper role of citizens with disabilities in society. *Id.*, 473 U.S. at 448.

Congress did not strike this crucial balance casually or heedlessly. Its considered judgment merits respectful deference in this Court.

IV. THE RESPECTIVE ROLES OF THIS COURT AND THE CONGRESS IN ENFORCING THE RIGHTS OF PEOPLE WITH DISABILITIES MUST REFLECT THE UNIQUE CHARACTER OF DISABILITY DISCRIMINATION.

The heart of the ruling in *Boerne* was the constitutionally mandated separation of powers between Congress and this Court. 521 U.S. at 536. This case also involves that same constitutional equilibrium, but the unique character of disability discrimination, and the nature of the ADA, suggest a very different analysis.

When Congress enacted the Religious Freedom Restoration Act (RFRA), its express purpose was to overturn this Court's constitutional judgment on the scope of the Free Exercise Clause. Although individual Members of the Court differed sharply on the appropriateness of the balance which had been struck in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), there was broader agreement that Congress lacked the constitutional authority to reject this Court's judgment.

By contrast, the ADA was hardly a reflexive attempt by Congress to overturn this Court's decision in *Cleburne* or any other case. Rather, it constituted a reasoned step in a course of careful legislative experimentation, which sought to bring individuals with disabilities into full enjoyment of American citizenship. *See Olmstead*, 119 S.Ct. at 2186 ("The ADA stepped up earlier measures to secure opportunities" for people with disabilities.) In the two decades preceding the enactment of the ADA, Congress had legislated to prevent discrimination by recipients of Federal funds, abolish the

exclusion of students with disabilities from public schools, and promote the provision of adequate services and the protection of the rights of citizens with disabilities.[11]

By 1990, Congress concluded that these piecemeal efforts, as important as they had been and continue to be, were insufficient to disassemble the barriers to full citizenship. It therefore enacted a more comprehensive statute, modeled in part on the Civil Rights Act of 1964 which had played a crucial part in the effort to bring another excluded segment of our nation's population into full citizenship.

Congress found an egregious history and a pervasive, continuing problem of State exclusion of people with disabilities from full citizenship. It knew that the tenacity of this exclusion resulted from the persistence of discriminatory practices. Those practices derived from (and reinforced) archaic and stereotypical views of the appropriate roles for those individuals in society. Indeed, in some cases they reflected a belief that people with disabilities should have no real role at all, or at most, a role defined by segregation and severely limited opportunities. Faced with this record, what was Congress supposed to do?

The alternatives open to Congress were, in fact, quite limited, if it wanted a solution to this pervasive problem. One possibility would be to continue the piecemeal approach, hoping that by addressing exclusion from citizenship in bits and pieces, incremental progress could be achieved. But Congress had already learned the limitations of that approach in the context of disability discrimination, just as it had known that the elimination of the racial caste system could

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[11] *E.g.* Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394; Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773; Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486 (1975); Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980).

not be accomplished by isolated steps (*e.g.*, "this year we'll desegregate drinking fountains").

Another approach would be to enact its protections for limited times, or in limited regions of the country, or allow enforcement upon an individualized showing of particularly outrageous facts. But this Court has made clear that while "termination dates, geographic restrictions, or egregious predicates" may be indicia of proportionality in some cases, they are not a requirement for the exercise of the authority granted by the Fourteenth Amendment. *Boerne*, 521 U.S. at 533. In the case of disability discrimination, they clearly would not have been effective or appropriate.

A third possibility would have been to address private discrimination alone, and leave the States beyond the law's reach. The fatal flaw in this approach is that it ignores the central role of the States in creating and perpetuating the exclusion. Full citizenship could not be guaranteed merely by requiring franchise restaurants to install ramps.

The final possible approach would have been to do nothing at all, hoping that State barriers to full citizenship might somehow eventually erode.

This Court's teachings on the scope of the Fourteenth Amendment do not require Congress to limit itself to these ineffectual responses.

As the Court has made clear, "It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *Kimel*, 120 S.Ct. at 644. Such deference is particularly warranted when Congress exercises its constitutional authority with care and circumspection. In enacting the ADA, Congress found that a Federal civil rights statute was necessary both to remedy and to prevent the obstacles faced by people with disabilities in their quest for full citizenship. It recognized "the necessity of

using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights" produced by this country's "grotesque" history of discrimination against people with disabilities. *Cf. Boerne*, 521 U.S. at 526; *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring). It crafted the law carefully, mindful both of the scope of the barriers faced by people with disabilities, and of the need to avoid placing unreasonable burdens on the States. In short, it acted constitutionally.

CONCLUSION

For these reasons, *amici* urge affirmance of the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

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THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR) is the Nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. Founded in 1876, AAMR has appeared as *amicus curiae* before this Court in numerous cases, including *City of Cleburne v. Cleburne Living Center.*

THE ARC OF THE UNITED STATES (formerly the Association for Retarded Citizens of The United States), through its nearly 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families. Since its inception, the Arc has vigorously challenged attitudes and public policy, based on false stereotypes, that have authorized and encouraged segregation of people with mental retardation in virtually all areas of life. The Arc was one of the leaders in encouraging passage of the Americans with Disabilities Act (ADA).

THE BRAIN INJURY ASSOCIATION, Inc., is a national, non-profit organization dedicated to brain injury prevention, research, education, and advocacy on behalf of persons with brain injuries. It serves persons with brain injury, their families and caregivers in all 50 states.

THE JOSEPH P. KENNEDY, JR. FOUNDATION, established in 1946, has as its objectives the prevention of mental retardation and the improvement of the way in which society deals with persons who have mental retardation.

THE NATIONAL COUNCIL FOR COMMUNITY BEHAVIORAL HEALTHCARE is the Nation's largest membership organization dedicated to ensuring appropriate and affordable community mental health and addiction services. Its membership includes providers of inpatient, outpatient, and residential care; partial hospitalization

programs; psychiatric rehabilitation services; state and local policy advocates; and managers of state and county systems of care.

AMERICAN PSYCHIATRIC NURSES ASSOCIATION (APNA) provides leadership to advance the psychiatric mental health nursing profession, and works to shape health policy for the delivery of mental health services. The APNA is concerned about discrimination experienced by people with disabilities, particularly individuals with mental illness, and works to help gain community acceptance of individuals with disabilities.

THE INTERNATIONAL ASSOCIATION FOR PSYCHOSOCIAL REHABILITATION SERVICES is dedicated to the promotion, protection, and improvement of services that facilitate the adjustment of persons with psychiatric disabilities into communities. Its members include agencies, mental health practitioners, policy makers, family groups, and consumer organizations.